IN THE SUPREME COURT OF THE STATE OF NEVADA

RAUL PIMENTEL HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57320

FILED

SEP 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a no contest plea, of possession of a controlled substance. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Motion to suppress

Appellant Raul Pimentel Hernandez contends that the district court erred by denying his motion to suppress evidence seized during his arrest, because the arrest warrant was not supported by probable cause. Specifically, Hernandez claims that the criminal complaint and affidavit in support of the complaint and arrest warrant "did not describe a crime," were conclusory rather than factual, and rested on hearsay, namely, Sergeant Jason Franklin's report detailing his investigation. See generally Whiteley v. Warden, 401 U.S. 560, 564-65 (1971). Pursuant to the plea agreement, Hernandez preserved this issue for review on appeal. See NRS 174.035(3).

"[A]rrests and searches must be based upon probable cause." Keesee v. State, 110 Nev. 997, 1001, 879 P.2d 63, 66 (1994); see U.S. Const. amend. IV; Nev. Const. art. 1, § 18. Whether probable cause supports issuance of a warrant is determined by a totality of the

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circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983); Keesee, 110 Nev. at 1002, 879 P.2d at 67; see also United States v. Fixen, 780 F.2d 1434, 1436 (9th Cir. 1986) (applying "totality of the circumstances" test to warrantless arrest cases and noting that probable cause standard for a warrantless arrest is at least as stringent as that required for issuance of an arrest warrant by a magistrate); Deutscher v. State, 95 Nev. 669, 681, 601 P.2d 407, 415 (1979). Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence" to believe that there is a substantial probability that a crime has been committed and that the person to be arrested committed the crime. Ornelas v. United States, 517 U.S. 690, 696 (1996); NRS 171.106 (arrest warrant shall issue if sworn complaint or supporting affidavit established probable cause to believe that defendant committed a criminal offense).

"The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies." Herring v. United States, 555 U.S. 135, 140 (2009). In fact, exclusion is a "'last resort.'" Id. (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). "When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant." Id. at 142 (quoting United States v. Leon, 468 U.S. 897, 922 (1984)).

Here, the State sought an arrest warrant, charging Hernandez with possession of drug paraphernalia, see NRS 453.566, after Sgt. Franklin submitted a crime report detailing his investigation and the discovery of a hollowed-out pen containing cocaine residue in a vehicle

under Hernandez's control. Chief Deputy District Attorney Brian Williams drafted a criminal complaint and affidavit in support of the complaint and arrest warrant and submitted both documents for the magistrate's review. The complaint alleged that Hernandez, on Bridge Street in front of the Winnemucca Hotel, was in possession of an item associated with the use of controlled substances; an item which, among other things, could be used to "ingest, inhale or otherwise introduce into the human body a controlled substance." The affidavit in support of the complaint and arrest warrant cites to Sgt. Franklin's "probable cause reports" as the basis for Williams believing that Hernandez was in possession of drug paraphernalia, gives the date and location, and makes specific reference to conversations and contacts with Sgt. Franklin of the Investigations Division, which indicate that Hernandez "possessed an item associated with the use of controlled substances." Based on the complaint and affidavit, the magistrate found probable cause to believe that the crime of possession of drug paraphernalia had been committed and signed the arrest warrant.

Although the documents submitted to the magistrate are troubling in their conclusory aspect, see Whiteley, 401 U.S. at 564-65, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct," Herring, 555 U.S. at 144, which Hernandez failed to show. Hernandez also failed to show that Sgt. Franklin's reliance on the validity of the search warrant was not objectively reasonable. Thus, we conclude that the district court did not err by denying Hernandez's motion to suppress. See Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008) (we review the district court's factual findings regarding suppression issues for clear error and review the legal consequences of

those findings de novo); see also Garrettson v. State, 114 Nev. 1064, 1068-69, 967 P.2d 428, 431 (1998) (probable cause determination will not be overturned on appeal "unless the evidence in its entirety provides no substantial basis for the magistrate's finding").

Bad faith prosecution

Hernandez contends that the State engaged in bad faith by waiting six months before charging him with misdemeanor possession of drug paraphernalia and applying for an arrest warrant. Citing Perez v. Ledesma, 401 U.S. 82, 85 (1971), and Kugler v. Helfant, 421 U.S. 117, 123-24 (1975), Hernandez claims that he was subject to a prosecution "brought without a reasonable expectation of obtaining a valid conviction." Hernandez raised this issue in his motion to suppress, thereby preserving it for review on appeal pursuant to the plea agreement. See NRS 174.035(3).

NRS 171.090(2) provides that, generally, misdemeanor charges must be filed within one year after the commission of the offense. The fact that the State sought the arrest warrant for possession of drug paraphernalia approximately six months after Sgt. Franklin's investigation, within the statutory timeline, is not in dispute. Other than noting the six-month delay and that the drug paraphernalia was not produced at the suppression hearing, Hernandez fails to provide any argument demonstrating how he was subject to a bad faith prosecution. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Additionally, the State dismissed the misdemeanor possession of drug paraphernalia charge approximately eight months before Hernandez filed

his motion to suppress. See NRS 174.085(5)(b). Therefore, we conclude that Hernandez's contention is without merit.

Abuse of discretion at sentencing

Finally, Hernandez contends that the district court abused its discretion at sentencing by denying his application for entry into a treatment or diversion program pursuant to either NRS 453.3363 or NRS 458.300. The extent of Hernandez's argument on appeal is that he "obtained an evaluation establishing his dependency" and "qualified."

Hernandez had previously been convicted of possession of a controlled substance and thus was ineligible for a treatment or diversion program pursuant to NRS 453.3363(1); see also NRS 453.336(1). The district court has wide discretion in its sentencing decision, Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987), which we will not disturb absent abuse. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Here, the district court properly exercised its discretion and denied Hernandez's application for entry into a program pursuant to NRS chapter 458 due to his criminal history and the facts of the case. Hernandez has not alleged that the district court relied on impalpable or highly suspect evidence at sentencing or that the relevant statutes are unconstitutional. See Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004); Denson v. State, 112 Nev. 489, 492-93, 915 P.2d 284, 286-87 (1996); see also NRS 453.336(2)(a) (category E felony). Moreover, Hernandez received probation and cannot demonstrate that the sentence is "so unreasonably disproportionate to the offense as to shock the conscience." Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); see also Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Therefore, we

conclude that the district court did not abuse its discretion at sentencing. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Humboldt County District Attorney
Attorney General/Carson City
Humboldt County Clerk